MOTION FILED

APR 11 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74—337

FRANK DORAN, Individually and as town attorney for the Town of North Hempstead,

Appellant,

v.

SALEM INN, INC., M & L REST., INC., and TIM-ROB BAR, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE A LATE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE TOWN OF SMITHTOWN, IN SUPPORT OF THE APPELLANT, FOR REVERSAL OF THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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FRANK DORAN, individually and as town attorney for the Town of North Hempstead,

Appellant,

v.

SALEM INN, INC., M & L REST., INC., and TIM-ROB BAR, INC.,

Appellees.

MOTION FOR LEAVE TO FILE A LATE BRIEF *AMICUS CURIAE*

This is a motion by the Town of Smithtown, a municipality located in the County of Suffolk, Long Island, State of New York. It is located approximately thirty (30) miles east of the Town of North Hempstead.

The Town of Smithtown has an ordinance[1] (attached hereto as Appendix I) substantially similar to the ordinance which is the subject of the direct appeal.

During the same timeframe, as set forth in the facts of the direct appeal, the Town of Smithtown has been endeavoring to enforce its Local Law #1—1973, but has been stymied by parallel litigation in the state and federal courts.

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[1] Chapter 15—Entertainment Regulations, Code of the Town of Smithtown, Suffolk County, New York.

Motion for Leave to File a Late Brief
Amicus Curiae.

Local enforcement of the ordinance by state criminal proceedings was enjoined on May 21, 1974, by the United States District Court, Eastern District, per Bruchhausen, J., pursuant to 42 U.S.C.A. 1983, on the grounds that Local Law #1—1973 placed the proponents, the manager, James Francione, and the owner, Gajon Bar & Grill, Inc., in danger of irreparable harm because the law, by its broad terms, was discriminatory on the basis of sex and had a chilling effect on the free exercise of their First Amendment rights and the public's right to view and be entertained by topless dancers.

The injunction was appealed to the U. S. Court of Appeals, Second Circuit, 508 F.2d 1317 (1974), which reversed on the principles of *Younger* v. *Harris,* 401 U.S. 37 (1971), stating:

> "Although a United States District Court has granted a preliminary injunction in *Salem Inn, Inc.* v. *Frank,* 364 F.Supp. 478 (E.D. N.Y. 1973) aff'd 501 F.2d 18 (2 Cir. 1974) on the ground that a similar ordinance was probably constitutionally invalid, New York State courts twice have upheld the constitutionality of similar local laws. *People* v. *Moreira,* 70 Misc.2d 68, 333 N.Y.S. 2d 215 (1972); *Brandon Shores, Inc.* v. *Village of Greenwood Lake,* 325 N.Y.S.2d 957 (1971)."

The local state criminal proceedings have been reactivated and are presently pending, a motion to dismiss having been made in the local state criminal court on the grounds of unconstitutionality.

This motion is made to join, support and advocate the arguments set forth in the brief of appellants in the pending appeal because the Town of Smithtown, as some 23

Motion for Leave to File a Late Brief
Amicus Curiae.

other New York State towns,[2] has adopted similar ordinances and this case has a statewide concern and interest; hence, the arguments of *amicus curiae* should be appropriately presented and received by this Court.

Counsel for appellants has consented to the appeal, but appellees have refused (see Exhibits A, B and C); for this reason, the brief is being filed late. It would further appear that possible consent is not necessary pursuant to Rule 42(4) of the Supreme Court Rules.[3] The Town of Smithtown is a political subdivision of the State of New York, it being a municipal corporation.[4]

WHEREFORE, movant prays that the attached brief *amicus curiae* be permitted to be filed by the Court.

Respectfully submitted,

HOWARD E. PACHMAN
Special Counsel to the
Town of Smithtown
Attorney for Amicus Curiae
6143 Jericho Turnpike
Commack, New York 11725
(516) 864-5900

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[2] A non-exhaustive survey of the Towns of New York State, exclusive of cities and villages, reveals the following towns have adopted the same or similar "anti-topless local law or ordinances" evidencing a substantial statewide policy and/or concern: Towns of Babylon, Bedford, Brandon, Colonie, Cheetowaga, Callicoon, Eastchester, Forestberg, Gates, Hempstead, Henrietta, Limberland, Moreau, North Hempstead, Ossining, Oyster Bay, Rotterdam, Southampton, Tusten, Warwick, Webb.

[3] "Consent to the filing of a brief of an *amicus curiae* need not be had when the brief is presented . . . for a political subdivision of a state . . ."

[4] McKinney's Cons. Laws of N.Y., Book 61, Town Law, Section 2.

Exhibit A-1

, P.C.

February 7, 1975

Joseph H. Darago, Esq.
220 Plandome Road
Manhasset, N.Y. 11030

Re: Gajon Bar & Grill, et al.
v. Eugene Kelley, et al.
(Salem Inn, Inc., et ai.
v. Town of North Hempstead,
et al.)

Dear Joe:

We enclose herewith stipulation pursuant to Rule 42 of the Supreme Court Rules. We would appreciate your signing the original and copy thereof and forwarding same to Kassner & Detsky, Esqs., and requesting that they sign the original and copy and return same directly to this office. An additional copy of the stipulation is enclosed herewith for your records, together with an additional copy thereof for Kassner & Detsky, Esqs.

Thank you for your cooperation.

Very truly yours,

HOWARD E. PACHMAN

hep/drh
Enclosures
cc: Hon. Paul J. Fitzpatrick,
Supervisor, Town of Smithtown
Charles F. Cacciabaudo, Esq.
Town Attorney, Town of Smithtown
} with encl

Exhibit A-2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

SALEM INN, INC., M & L REST., INC., and
TIM-ROB BAR, INC.,

Appellees,

v.

LOUIS J. FRANK, individually and as Police Commissioner of Nassau County, FRANK DORAN, individually and as Town Attorney of the Town of North Hempstead, and HOWARD EINHORN, individually and as Chief of Police of the Village of Port Washington,

Appellants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

WE HEREBY CONSENT, pursuant to Rule 42 of the Supreme Court Rules, that the attached *amicus curiae* brief may be filed in this proceeding with the Supreme Court of the United States.

Dated: February , 1975.

JOSEPH H. DARAGO
Attorney for Appellant Francis F. Doran, individually and as Town Attorney of the Town of North Hempstead

KASSNER & DETSKY
Attorneys for Plaintiffs-Appellees

Exhibit B

, P.C.

February 24, 1975

Joseph H. Darago, Esq.
220 Plandome Road
Manhasset, N.Y. 11030

Re: Gajon Bar & Grill, et al.
v. Eugene Kelley, et al.
(Salem Inn, Inc., et al.
v. Town of North Hempstead,
et al.)

Dear Joe:

A review of our file indicates that on February 7, 1975, we forwarded to you a stipulation pursuant to Rule 42 of the Supreme Court Rules permitting the Town of Smithtown to appear *amicus curiae* in the Salem Inn action. As of this writing, we have not received the stipulation executed by your office or by Kassner & Detsky, Esqs. Kindly advise us as to the reason for the delay.

We await your early response.

Very truly yours,

hep/drh

Howard E. Pachman

Exhibit C

, P.C.

March 3, 1975

Kassner & Detsky, Esqs.
122 East 42nd Street
New York, N.Y. 10017

Att: Herbert S. Kassner, Esq.

Re: Salem Inn, Inc., et al. v. Town of
North Hempstead, et al.
(Gajon Bar & Grill, et al. v. Eugene
Kelley, Town of Smithtown, et al.)

Dear Mr. Kassner:

On February 7, 1975, we forwarded to Joseph H. Darago, Esq., stipulations, pursuant to Rule 42 of the Supreme Court Rules, to appear as amicus curiae in the above matter.

Mr. Mineo of Mr. Darago's office advised us that the stipulations had been signed by them and forwarded to your office for execution. My secretary contacted your office and was unable to speak with you but spoke with your partner, Mr. Detsky, who indicated that he was, apparently, reluctant to sign the stipulations and suggested we make a motion to intervene. This procedure would appear to be cumbersome and require additional work, all of which is unnecessary and can be obviated by the signing of the stipulation.

The issues are significant and affect towns throughout the State of New York. As Special Counsel to the Town of Smithtown, we are desirous of having a definitive decision from the Supreme Court and would like to add our brief

in support of the municipality's position. Your failure to consent does not do justice to the issues but would appear to pursue a partisan approach.

We trust you will re-evaluate your position and promptly execute and return the stipulations previously forwarded to you.

Thank you for your anticipated cooperation.

Very truly yours,

Howard E. Pachman

hep/drh
cc: Joseph H. Darago, Esq.

Appendix I

Chapter 15

ENTERTAINMENT REGULATIONS

Local Law
No. 1
1973

A LOCAL LAW TO REGULATE ENTERTAINMENT IN PUBLIC PLACES

§ 15-1. Clothing requirements.

§ 15-2. Definitions.

§ 15-3. Violations and penalties.

§ 15-4. When effective.

§ 15-5. Repealer.

[HISTORY: Adopted Smithtown Town Board 1-23-73 as Local Law No. 1, 1973.[1] Amendments noted where applicable.]

Be it enacted by the Town Board of the Town of Smithtown as follows:

§ 15-1. Clothing requirements.

It shall be unlawful for any female to appear in public clothed or costumed in such a manner that the portion of her breast below the top of the areola is not covered with a

---

[1] Editor's Note: This local law supersedes former Ch. 15, Entertainment Regulations, adopted 8-4-70 as L.L. No. 2, 1970.

fully opaque covering. Any person shall be guilty of violating this section who, in any capacity, knowingly directs, gives, manages, participates in, prepares or presents, or who employs others so to do any live public show in which a female appears clothed or costumed in such a manner that the portion of her breast below the top of the areola is not covered with a fully opaque covering.

§ 15-2. Definitions.

For the purpose of this local law, the terms used herein are defined as follows:

In Public—Any place to which the general public has a right to resort; not necessarily a place devoted solely to the uses of the public, but a place which is in point of fact public rather than private, a place accessible to the public to gather or pass to and from.

Live Public Show—A public show in which human actors, dancers or other performers, employees or other persons appear in person before spectators or customers. A bona fide drawing, painting, photography, sculpture or other art class utilizing human models and admitting only participating instructors, students and models shall not be deemed a "live public show."

Public Show—Any entertainment or exhibition advertised or in other fashion held out to be accessible to the public, whether or not an admission or other charge is levied or collected; an entertainment or exhibition shall be deemed a "public show" although access to it is only granted to members of a club or other association when membership in such organization is obtained upon payment of an admission price or contribution or token dues or other small fee, and the organization in fact exists primarily for sponsoring or arranging admissions to such performances.

§ 15-3. Violations and penalties.

Any person found guilty of violating this local law shall be subject to imprisonment not to exceed fifteen (15) days, or a fine to be fixed by the court not to exceed two hundred fifty dollars ($250.), or both.

§ 15-4. When effective.

This local law shall take effect ten (10) days after adoption.

§ 15-5. Repealer.

This local law supersedes and replaces Local Law No. 2 of 1970.

Supreme Court of the United States

IN THE

OCTOBER TERM, 1974

No. 74—337

FRANK DORAN, individually and as town attorney for the Town of North Hempstead,

Appellant,

v.

SALEM INN, INC., M & L REST., INC., and TIM-ROB BAR, INC.,

Appellees.

BRIEF *AMICUS CURIAE* OF THE TOWN OF SMITHTOWN, IN SUPPORT OF THE APPELLANT, FOR REVERSAL OF THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Preliminary Statement

This case presents a fundamental challenge to the rights of a municipality to enact local laws in the area of health, safety and morals, pursuant to the authority vested in it by the Constitution of the State of New York and the various laws enacted by the New York State Legislature, more particularly Chapter 40 of the Laws of the State of New York, for the year 1970, which amended Sections 245.01, 245.02 of the N. Y. Penal Law.*

---

* McKinney's Consolidated Laws of N.Y., Book 39, Penal Law Sections 245.01, 245.02.

Statement

The instant case arises from an appeal of a judgment of the United States Court of Appeals for the Second Circuit, which was entered the 25th day of June, 1974, entitled *Salem Inn, Inc.* v. *Frank,* 501 F.2d 478 (1974), which affirmed an injunction issued by the U.S. District Court, Eastern District, per Bartels, J., dated the 26th day of September, 1974, 364 F. Supp. 478 (1973), which declared the Town of North Hempstead's Local Law No. 1 of 1973 unconstitutional.

The appellants are Louis J. Frank, Police Commissioner for Nassau County, Frank Doran, Town Attorney for the Town of North Hempstead, and Howard Ernhorn, Chief of Police for the Village of Port Washington, who were charged with the enforcement of Local Law No 1 of 1973, a law prescribing the regulation of cabarets, bars, lounges, dance halls, discotheques and other public places in general, in essence an "anti-topless ordinance" (J.S.-4).**

The appellees are the owner and operator of bars which provide entertainment by permitting and exhibiting topless dancers.

The brief is written in support of the appellants' position that Local Law No. 1 of 1973 is constitutional.

Question Presented

1. This Court is called upon to affirm the right of a municipality to enact and enforce legislation in the area of health, safety and morals, i.e., to prohibit entertainment commonly called "topless dancing", more particularly where such legislative mandates have been affirmed by the state's highest court.

** J.S.—refers to pages of Jurisdictional Statement.

(A)

The Town of North Hempstead's Local Law No. 1 of 1973 derives its sanction from the statewide application and authority of Penal Law 245.01. This particular section of the Penal Law was scrutinized by the New York State Court of Appeals and was sustained. *People* v. *Price,* 33 N.Y.2d 831, 351 N.Y.S.2d 973 (1973), which reversed an affirmance of an order of the Appellate Term, First Department, entered December 11, 1972, one justice dissenting, a judgment of the Criminal Court, New York County, rendered August 11, 1971, convicting the appellant, Ch[illegible] Lee Price, after trial, of exposure of a female (Penal Law 245.01). The operative facts may be gleaned from the dissenting opinion of Mr. Justice Markowitz:

> "The complaint alleged that the complaining officer saw defendant walking on Aug. 5, 1971, at 5:30 P.M. at 2nd Avenue and East 12th Street, Manhattan, 'wearing a dress in such a manner that the entire areola and nipple were exposed.' His partner testified that on the date and time referred to defendant was wearing a 'fishnet type pullover (a mesh pullover) with wide openings which made the breasts fully visible to the public.' The diamond-shaped openings were about ½ an inch. Being a pullover type, there were no buttons or zippers. The officers were in a squad car at the time. There was no crowd before the arrest."

The Court of Appeals reversed the affirmance in the following opinion:

> "The order of the Appellate Term should be reversed, and the information dismissed. Statutes punishing indecent exposure, though broadly drawn, must be carefully construed to attack the particular evil at which they are directed. Section 245.01 of the Penal Law was aimed at discouraging 'topless' waitresses and their promoters. It should not be applied to the

noncommercial, perhaps accidental, and certainly not lewd, exposure alleged. Certainly, legislation may not control the manner of dress, absent commercial exploitation of exposure, or absent conduct or dress under circumstances creating or likely to create public disorder." (Citations omitted.)

Thereafter, the Appellate Term, Second Department, in *People* v. *Hardy* (N.Y. Law Journal, June 5, 1974, p. 19, col. 1), one justice dissenting, concluded:

"Judgment of conviction reversed on the law and facts, complaint dismissed and fine remitted.

"Defendant was charged with violating Penal Law Section 245.00 in that she was sun-bathing in the nude on a public beach along with several other persons. Under the law nudity in itself is not prohibited and lewdness cannot be presumed from the mere fact of nudity. There must be a showing of lewd conduct from which the intention to act in a lewd manner can be drawn. Since no evidence was introduced establishing that defendant had intentionally exposed her private parts in a 'lewd manner' or otherwise committed a 'lewd act', her guilt was not established beyond a reasonable doubt." (Citations omitted.)

Two Appellate Courts of New York have narrowly defined Penal Law Section 245.01. This has no less been the case when the local criminal courts were called upon to rule on the anti-topless ordinances. *People* v. *Moreira,* 70 Misc.2d 68, 333 N.Y.S.2d 215 (1972). A similar local ordinance to the one at bar was determined to be constitutional in *Brandon Shores, Inc.* v. *Inc. Village of Greenwood Lake,* 68 Misc.2d 343, 325 N.Y.S.2d 957 (1971).

The New York courts had used basic concepts of construction which limit, clarify and interpret statutes and/or ordinances so as to avoid the necessity of reaching the

constitutional question; the narrow definition put on the statute is that "the commercial exploitation of exposure" (*People* v. *Price,* 33 N.Y.2d 831, 351 N.Y.S.2d 973 (1973)) and the "bald attempt to profit on indecent exposure and drink" (*J.D.H. Rest. Inc.* v. *N.Y. State Liquor Authority,* 21 N.Y.2d 846, 288 N.Y.S.2d 1003 (1968), which affirmed without opinion 28 A.D.2d 521, 279 N.Y.S.2d 975) constitute conduct properly proscribed and thereby prohibited by a state penal statute; ergo, Local Law No. 1 of 1973 is not protected by the United States Constitution, First Amendment; the New York State Constitution, Article 1, Section B. These decisions are in consonance with the principles set forth in *United States* v. *O'Brien,* 391 U.S. 367 (1968), 376:

"We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."

This was reasserted by the Court in *California* v. *LaRue,* 409 U.S. 109 (1972), 117:

"But as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases. States may sometimes proscribe expression that is directed to the accomplishment of an end that the State has declared to be illegal when such expression consists, in part, of 'conduct' or 'action'."

Since Local Law No. 1 of 1973 is directed at prohibiting a particular form of conduct, rather than "pure speech"

and, further, since the Local Law is quasi-criminal in nature, the appellees' attack on the law as being unconstitutional for facial overbreadth must meet the following standard:

> "To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick* v. *Oklahoma,* 413 U.S. 601, 615 (1973).

(B)

The New York State courts are not singular in their prohibition of topless dancing in bars. If we cross the Hudson River to the State of New Jersey, Pennsauken, Camden County, we find that New Jersey Lewdness and Obscenity statutes are being employed by the Camden County Courts and the Trenton District Court to restrict topless dancing. Although the problems are similar, the courts are reaching a different conclusion on the nuances of *California* v. *LaRue,* 409 U.S. 109 (1972), from that reached by the Court in *Salem Inn, Inc.* v. *Frank,* 501 F.2d 478 (2d Cir., 1974).

The initial litigation is reported in *Cherbonnie* v. *Kugler,* 359 F. Supp. 256 (D.C. N.J. 1973), and the facts and allegations have a strikingly similar cast:

> Plaintiffs are waitresses and employees of the Club Lido, its corporate owner, stockholder, manager, entertainers and a patron. The defendants are the State Attorney General, the County Prosecutor, the State A.B.C. Board and other law enforcement officials.
>
> Plaintiffs contend that the statutes and regulations under attack facially violate the First and Fourteenth Amendments to the federal Constitution in that the proscriptions therein infringe on their freedom of expression and, alternatively, are void for vagueness,

> with respect to the activity of topless dancing conducted for the entertainment of patrons of Club Lido.
>
> Defendant claimed that the statutes were facially constitutional and the court should refrain under the constraints of the abstention doctrine.

The Court considered the application of *California* v. *LaRue,* 409 U.S. 109 (1972), and abstained and made the following additional finding:

> "Moreover, inasmuch as a constitutional interpretation of the Lewdness Statute may be possible, and since there are presently pending in the State Superior Court a number of criminal cases in which the statutes herein involved are being challenged on a constitutional basis, the state courts should be afforded the initial opportunity to so interpret them. Consequently, we abstain." (at p. 260)

At this juncture, the matter came to a temporary halt. On February 8, 1974, the District Court in Trenton rendered a decision under the caption *Starshock, Inc.* v. *Shusted,* —— F. Supp. —— (D.C. N.J. Index #1805/73, February 8, 1974), which once again brings the Club Lido into court with many of the same parties and others in their representative capacities, but without the Alcoholic Beverage and Control Board, as a party defendant, since the liquor license was suspended.

The Club Lido had reopened under the banner: "Nude Interpretive Dancing—No Alcoholic Beverages Sold."

An action for declaratory judgment was commenced to enjoin the municipality from interfering with the Club's introduction of this form of entertainment into the local community.

The Court framed the following issue:

> "Is 'nude interpretive dancing' embraced within the guarantee of freedom of speech under the First Amendment to the United States Constitution?"

The Court reviewed the current trend of the law in this area and concluded:

> "The Supreme Court has taken a similar position with regard to the power of the state to limit gross sexual conduct devoid of any, or very minimal, elements of expression. *Miller* v. *California, supra* [413 U.S. 15 (1973)], at 26 n. 8; *California* v. *LaRue,* 409 U.S. 109, 117 (1972).
>
> "It is determined that the performances offered at the Club Lido fall far short of presenting an issue of 'speech' sufficiently important to outweigh the State of New Jersey's interest in curtailing nudity in public places . . . Although advertised as 'Nude Interpretive Dancing,' it was neither interpretive or dancing—just nude, a 'Go-go' performance bereft of outer dress. What we have here is a cheap exploitation of human sexuality for purely commercial purposes.
>
> • • •
>
> "Plaintiffs' motion for a Preliminary Injunction will be and hereby is denied."

On appeal, the Third Circuit Court of Appeals remanded the matter to the District Court for further proceeding because plaintiff was not given an adequate opportunity to present its cause to the District Court. The appeal was only decided on procedure grounds. *Starshock, Inc.* v. *Shusted,* —— F.2d —— (Index #74-1165, 3rd Cir., April 30, 1974).

The case was then reheard by the District Court and on July 29, 1974, after a hearing, the Court rendered its decision. *Starshock, Inc.* v. *Shusted,* —— F. Supp. —— (D.C. N.J., Trenton, Index #1806/73, July 29, 1974):

> "I found nothing in the testimony or in my view of the performance which would differentiate my view from that of the Chief Judge earlier. The State certainly has the power to limit, control the type of activity under consideration. *Miller* v. *California,* 413 U.S. 15 (1973).
>
> "I agree with the views expressed by the Chief Judge and only emphasize that we are dealing in the area of conduct rather than speech."

(C)

This case must be assayed and tested under the rules set forth in a case of similar import which was decided by the Supreme Court of California, *Crownover* v. *Musick,* 107 Cal. Rept. 681, 509 P.2d 497 (1973), which was an action to restrain, on constitutional grounds, enforcement of two county ordinances and city ordinance . . . challenging validity of ordinances . . . to prohibit further proceedings in certain criminal prosecutions for violation of ordinances . . . which . . . prohibited nudeness on part of performers . . . in places where liquor and food were sold and which provided an exemption for theaters, denied neither freedom of speech and expression nor equal protection and were in all respects valid and constitutional regulations of conduct.

The issue there, as here, may be stated as follows:

> "Is topless dancing 'speech' or conduct which is in essence 'speech' or 'closely akin to speech'?"

The California Supreme Court held:

> "They do not prohibit entertainment but merely enjoin that if the entertainer or performer offers it, he or she must have some clothes on. In a word the ordinances regulate conduct. (509 P.2d 497, p. 510)
>
> • • •
>
> "Unless we wish to blind ourselves to what is happening in big cities with their 'topless' and 'bottomless' bars and 'nude live acts' in a tawdry atmosphere

that blights the neighborhood if not the entire community, it is common knowledge that such conduct is nothing more than a sales gimmick. It is delusive to speculate in the face of these realities that the entertainment in this milieu will acquire protectible communicative properties by exposure of the genitals, pubic area or female breasts of the performers. Assuming arguendo that there may ensue in instances an expression which is communicative in the constitutional sense, we do not think it is unreasonable to regulate the *form* or *manner* of the communication. (p. 510)

* * *

"We, therefore, conclude that the ordinances on their face do not infringe upon the rights of freedom of speech or expression but are valid regulations of conduct. In light of this conclusion we reject plaintiffs' contention that the ordinances are unconstitutionally broad. (p. 512)

* * *

"We, therefore, inquire whether the distinction inherent in the 'theater exemption' bears some rational relationship to a conceivable governmental purpose. We are of the opinion that it does. We judicially notice (a) as a matter of generalized knowledge that theater entertainers usually perform on a stage removed from the audience, while waiters and waitresses must by virtue of their calling mingle constantly with the patrons. Similarly, if entertainers perform on a stage in a bar, that stage is likely to be much smaller and closer to the patrons than is a stage located in a theater. As noted *supra* in our discussion of the police power, there are conceivable and legitimate state purposes involved in regulating the exposure of the public area, genitals or breasts by waiters, waitresses and entertainers. Such purposes conceivably include the furtherance of the public order, morals and welfare. But the same considerations are arguably not involved in a theater where nude persons are generally separated from the customers by a stage of large dimensions. Situations provide a rational basis to treat differently nude performers in theaters, on the one hand, and nude performers, waiters and waitresses in establishments such as plaintiffs' on the other." (Citations omitted.) (p. 514)

(D)

Although the District Court had jurisdiction to entertain the motion and the original litigation, there remains the question whether consistently with the principles governing equitable relief the Court should have exercised its remedial powers.

This concept is most applicable when the state courts have decided the matter and/or there is a state criminal proceeding pending. In two most recent decisions of this Court, the aforestated principle has been reaffirmed:

". . . We think this consideration to be of some importance because it is typically a judicial system's appellate courts which are by their nature a litigant's most appropriate forum for the resolution of constitutional contentions. Especially is this true when, as here, the constitutional issue involves a statute which is capable of judicial narrowing. In short, we do not believe that a State's judicial system would be fairly accorded the opportunity to resolve federal issues arising in its courts if a federal district court were permitted to substitute itself for the State's appellate courts." *Huffman* v. *Pursue, Ltd.*, —— U.S. —— (No. 73-296, March 18, 1975), 43 L.W. 4379.

"As to state criminal prosecutions, such justification has been found to reside in the peculiarly compelling demands of federalism and the 'special delicacy of the adjustment to be preserved between federal

> equitable power and State administration of its own law . . .' The precise content of constitutional rights almost invariably turns on the context of fact and law in which they arise. State courts are quite as capable as federal courts of determining the facts, and they alone can define and interpret state law. Equally important, under Art. VI of the Constitution, state courts share with federal courts an equivalent responsibility for the enforcement of federal rights, a responsibility one must expect they will fulfill." (Citations omitted.) *Schlesinger* v. *Councilman*, —— U.S. —— (No. 73-662, March 25, 1975), 43 L.W. 4432.

The state courts of New York having held that local ordinances adopted pursuant to Section 245.01 of the State Penal Law are constitutional, this Court should reverse the United States Court of Appeals for the Second Circuit and remit this matter to the state courts for determination and disposition.

CONCLUSION

Local Law No. 1 of 1973 of the Town of North Hempstead is constitutional and the decision of the United States Court of Appeals for the Second Circuit should be reversed and the relief requested by the appellants be granted.

Respectfully submitted,

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